COVER SHEET

“Who Then in Law is My Neighbour?” – Reverting to First Principles in the High Court of Australia

Abstract

A trilogy of recent cases before the Full Bench of the High Court of Australia indicate a return to the celebrated statements of Lord Atkin, (himself a native of Australia) formulated some seventy years earlier, as the underlying guide in determining whether a duty of care exists in any circumstance.

Whilst various approaches have emerged in the High Court over the past decade involving differing combinations of principle, policy and incremental development, none has proved satisfactory as a general determinant of duty of care in the expanding focus of negligence litigation.

This article suggests that the search for a general determinant of the duty issue, has finished where it began and that the principle of neighbourhood as formulated and intended by Lord Atkin has and will continue to provide a universal yardstick as to the existence of a *prima facie* duty of care.

Introduction

Various reasons underpin the approaches that have emerged in Australia and other common law countries for determining a duty of care. Not least has been the recognition of exceptions or the general abandonment of the exclusionary rule (a rule denying generally any recovery for purely economic loss not resultant on injury to the plaintiff’s person or property).

Claims for purely economic loss resulting from negligent acts or statements (advice or information) raise the spectre of indeterminate liability and have provided adventurous lawyers and disgruntled clients with a new horizon of potential awards. Claims for negligently inflicted purely economic loss may involve mass torts such as economic loss from the failure of public utilities (eg power supply).[1] Environmental or toxic torts (eg asbestos, agent orange, oil spills)[2] and class actions by consumers for defective or dangerous products (eg silicon implants, cigarettes) have absorbed for years the entire focus of some law firms.

Actions for wrongful birth[3] and claims against public authorities[4] highlight some of the expanding areas of negligence law.

Speculative actions (no win no fee) and a heightened awareness in the community through media coverage of negligence litigation and large awards have contributed to the volume of such litigation.

Negligently inflicted economic loss and negligently caused psychiatric illness are similar, in that they have the propensity to manifest at one or more removes from the direct effect of the negligence (the ripple effect).[5] Such claims have challenged the Courts to find an approach to duty of care which balances the need for corrective and compensatory justice to victims of negligence, while preventing an indeterminate

[1] SCM (United Kingdom) Ltd v W J Whittal and Son Ltd [1971] 1 QB 337; Spartan Steel and Alloys Ltd v Martin and Co (Contractors) Ltd [1973] 1 QB 27.
[2] See e.g. Union Oil Company v Oppen (1974) 501 F 2d 558.
[3] See e.g. Goodwill v Pregnancy Advisory Service [1996] 2 All E R 161.
[4] See most recently Graham Barclay Oysters Pty Ltd v Ryan: Ryan v Great Lakes Council: New South Wales v Ryan (2002) 77 ALJR 183
[5] Annetts v Australian Station Pty Ltd (2002) 76 ALJR 1348

liability where potential awards far outweigh the wrong done. Justice to the plaintiff may be weighed against wider public interest and policy concerns such as the undermining of existing patterns of law in other fields; statutory intent denying such liability; interference with the defendant's legitimate pursuit of personal advantage; economic efficiency and the ready availability of cheap loss insurance rather than prohibitive liability insurance; availability of other remedies, for instance in contract. More specific policy issues which may conflict with the right of the innocent plaintiff to be compensated for negligently generated economic loss can include: the public interest in protecting policy discretions (as opposed to operational decisions) exercised by public authorities; whether tort law should compensate for interference with a mere expectation; immunity of barristers from suit for "in Court" negligence; joint illegal enterprise as a bar to civil suit. It is the search for an approach that can accommodate and balance these issues in the variety of negligence claims that has caused differing formulations for the ascertainment of a duty of care in a given circumstance.

The Approaches

The approaches that have emerged over the past decade in the High Court of Australia are variant combinations of incremental development, principle and policy. When synthesized, three fundamental approaches to determining duty have been utilized in the High Court.[6]

Firstly, an incremental or categories approach recognizing a duty of care in discrete categories. This approach relies on deduction and analogy with precedents in established categories of duty.

[6] See Perre v Apand Pty Ltd (1999) 198 CLR 180 at269,270

Secondly, an approach reliant on an examination of "salient features" or "legal policy" factors that support or derogate from a finding of duty. Some of these "salient factors" are universal while others are relevant in discrete categories. A non-exhaustive list might include: indeterminate liability; unwarranted interference with the autonomy of individuals; vulnerability of the plaintiff involving control of the defendant and dependence by the plaintiff (the plaintiff having no alternative legal means of protection e.g. by contract); knowledge actual or constructive of the defendant that its act will harm the plaintiff; undermining existing patterns of law in other fields; statutory intent denying such liability; economic efficiency.
Thirdly, an approach or methodology of general application involving an examination of the criteria of "reasonable foreseeability", "proximity" and competing "policy" to provide an answer to the duty question. [7]

Inadequacies of these Approaches

It is suggested that the inability of the varied approaches utilized by the High Court to provide a workable yardstick to the range and diversity of negligence claims has led the Court back to first principles.

Incremental or categories approach

If as Sir Gordon Bisson commented in the Court of Appeal in New Zealand on the incremental or categories approach , it described a process involving "an incremental step being a small amount by which a variable quantity increases"[8], then in many of the novel claims brought before the courts it has not been possible to work

[7] Perre v Apand Pty Ltd (1999) 198 CLR 180 ; Romeo v Conservation Commission of the Northern Territory (1998) 192 CLR 431; Pyrennes Shire Council v Day (1998) 192 CLR 330
[8] South Pacific Manufacturing Co Ltd v New Zealand Security Consultants and Investigations Ltd [1992] 2 NZLR 282 at 325.

incrementally from established categories or cases. The "cell must divide" providing for a new category or the court must refuse to expand the existing categories. This difficulty with incremental development can be highlighted in the tort of negligent misstatement. The foundation cases established a duty of care was owed to an identified and intended recipient of negligent advice where the speaker had directed the statement for use by the recipient in a known transaction.[9] It was not an incremental step to expand liability from this established category of the intended user of a negligent statement, to encompass an unintended and unknown user or a passive sufferer of a third party's reliance on negligent advice. If a duty of care arose in these latter categories, it required a "giant leap" not an incremental step. No guidance was given to the court by an incremental or categories approach to the duty issue. As stated earlier, either the cell had to divide or the law had to confine liability to the existing "intended user" category. Examples can be provided *ad nauseum* to indicate the inadequacy of an incremental or categories approach in providing a yardstick on the duty issue in novel claims for negligence. Whether to expand liability for negligently inflicted psychiatric illness from the established category requiring direct perception of a distressing event or its immediate aftermath, to such illness caused by mere communication of distressing news, is not a question resolved by analogy between the existing category and the proposed new category. Such a choice is made by reference to over-arching principle or relevant policy issues.

Criticism of the approach has come from members of the High Court itself. Gummow J has stated that "the making of a new precedent will not be determined merely by seeking the comfort of a earlier decision of which the case at bar may be seen as an

[9] Candler v Crane Christmas and Co [1951] 2 KB 164; Hedley Byrne & Co Ltd v Heller & Partners Ltd [1964] AC 465.

incremental development, with an analogy to an established category. Such a proposition, in terms used by McCarthy J in the Irish Supreme Court, 'suffers from a temporal defect – that rights should be determined by the accident of birth'".[10] Kirby J has stated that the exceptional categories "wander on the face of the law in search of an unexpressed general principle"[11]

The "Salient Features" Approach

A fundamental criticism of this approach is that it has not provided a methodology but is simply a list of potentially relevant "legal policy" factors whose prioritizing and significance in any given circumstance depends on a value judgment. These "salient features" have been listed above. No over-arching principles guide the application and importance of these salient features. The weighing of such factors involves an *ad hoc* response and such an approach provides no guidance or predictability as to the likely outcome of the duty issue in novel cases. Conceptually, these salient features belong to the evaluation of considerations of policy and are not anchored to legal principle. They derive from public policy and justice concerns.

Kirby J in the High Court of Australia has been the most vocal critic of the "salient features" approach stating that these so called "principles" were not issues relevant to all negligence actions and it was therefore inappropriate to elevate them so that they were legal preconditions to the existence of a duty of care in negligence. They were not even essential or relevant to every case framed in negligence.[12] Kirby J has rejected the "salient features" approach referring to the necessity for a general or

[10] (1999) 198 CLR 180 at 253,254
[11] Ibid at 280,281
[12] Perre v Apand Pty Ltd (1999) 198 CLR 180 at 285

conceptual methodology, which provides the headings to which such considerations can be assigned.[13]

While an examination of these legal policy factors may produce a just outcome on the duty issue by weighing public interest factors against individual rights, it is at the expense of certainty and predictability. Kirby J has stated that "a cornucopia of verbal riches has been deployed to identify what, in given proceedings, these 'salient features' will be".[14]

It might be suggested that an examination of salient features is not an approach at all but merely an unfettered discretion to prioritise factors, which subjectively appeal to the court as relevant in the case at hand. For instance where a finding of duty of care might potentially lead to indeterminate liability, how is such a factor to be weighed against the right of a foreseeable victim to compensation for gross negligence, particularly where the victim was vulnerable and under the control of the defendant and had no access to other means of compensation? Some support for the "salient features" approach has come from Gaudron and McHugh JJ in the High Court.[15]

The "Over-Arching Principles" Approach

This approach in the High Court had involved the concepts of reasonable foreseeability, and proximity, the latter encompassing policy issues unrelated to any

[13] Ibid.
[14] Graham Oysters Pty Ltd v Ryan; Ryan v Great Lakes Council; New South Wales v Ryan (2002) 77 ALJR 183 at 228
[15] See the judgments of Gaudron J and McHugh J in Perre v Apand Pty Ltd (1999) 198 CLR 180 at 195,203

measure of closeness or directness of relationship.[16] It was inevitable that the High Court would ultimately reject the concept of proximity as providing a universal yardstick in the determination of duty and enlist other approaches abandoning any reference to proximity whatsoever. This inevitability stemmed from the meaning ascribed to the term and its application in negligence litigation, particularly in claims for purely economic loss. The High Court had effectively divorced the term (proximity) from its historical narrow meaning and had pressed it into serving a purpose it was neither capable of nor originally designed to perform. Proximity had been cast adrift from its historical meaning of "neighbourhood" (closeness and directness of relationship measured by physical, causal or circumstantial propinquity; see the discussion below) and was utilized merely as a convenient label to attach to a complex of factors, not necessarily restricted to indicators of a close and direct relationship which in combination the law recognized as giving rise to a duty of care.[17] Under this broader utilization of the concept, proximity, when held to exist, "announced a result rather than articulated a concept".[18] It has been suggested that this enlarged meaning of proximity corresponded to the duty of care question itself[19] and was a hollow concept providing no guidance beyond merely indicating that something more was required other than reasonable foreseeability to raise a duty of care. The use of proximity in the High Court was best summarized by the majority in *Hill v Van Erp.*[20] They perceived proximity as expressing the result of a process of reasoning rather than the process itself. They considered however that it was a useful term operating as a conceptual umbrella signifying that something more than

[16] See the discussion in Katter NA "Duty of Care in Australia; Is the Fog Lifting" (1998) 72 ALJ 871 at 873.
[17] See Gala v Preston (1991) 172 CLR 243; Hill v Van Erp (1997) 188 CLR 159
[18] Sir Robin Cooke "An Impossible Distinction" (1991) 107 LQR 46 at 54.
[19] McHugh "Neighbourhood, Proximity and Reliance" in Finn (Ed) *Essays on Torts* (Law Book Company Ltd, Sydney, 1989), p 38.
[20] (1997) 188 CLR 159

reasonable foreseeability was required to establish a duty of care and that it was appropriate to describe in terms of proximity those relationships, where after the ordinary processes of analogy with established categories and after weighing relevant policy considerations, a duty had been found.[21]

The difficulty in application and the lack of guidance provided by the above approaches has prompted a return by the High Court to Lord Atkin's principle of "neighbourhood" as a *prima facie* determinant of duty.

Lord Atkin's Formulation of "Neighbourhood"

An analysis of Lord Atkin's celebrated judgment in *Donoghue v Stevenson*[22] and his references therein to the earlier cases of *Heaven v Pender*[23] and *Le Lievre v Gould*[24] indicate that Lord Atkin perceived that reasonable foreseeability as a test for duty of care, "was demonstrably too wide"[25] to use his words. He considered that "if properly limited was capable of affording a valuable practical guide".[26] Lord Atkin formulated the following statement as to who qualifies as a "neighbour" at law;

> "Persons who are so closely and directly affected by my act that I ought reasonably to have them in contemplation as being so affected when I am directing my mind to the acts or omissions which are called in question"[27]

Immediately following this statement of "neighbour" Lord Atkin continued;

[21] Ibid at 177,178,189.
[22] [1932] AC 562.
[23] (1883) 11 QBD 503.
[24] [1893] 1 QB 491.
[25] [1932] AC 562 at 580.
[26] Ibid.
[27] Ibid.

> "This appears to me to be the doctrine of *Heaven v Pender* as laid down by Lord Esher (then Brett MR) when it is limited by the notion of proximity introduced by Lord Esher himself and A L Smith LJ in *Le Livere v Gould*"[28]

Lord Atkin's test of "neighbourhood" or "proximity" was an overriding control on reasonable foreseeability at large. His judgment in *Donoghue v Stevenson* indicates that a defendant is not liable to all those whose damage can reasonably be foreseen as a result of the defendant's negligence but only to those "neighbours" who are in such *close and direct relations* to the defendant or who are *so closely and directly affected* by the defendants acts, that the defendant ought reasonably to have them in contemplation. As to whether the plaintiff was in such close and direct relations with the defendant or was so closely and directly affected by the defendant's act that the plaintiff should have been in contemplation, was not a question answered by reference solely to physical or geographical propinquity. Lord Atkin in *Donoghue v Stevenson* was at pains to emphasise that proximity or neighbourhood should not be so confined in meaning. He stated:

> "I think that this sufficiently states the truth if proximity be not confined to mere physical proximity, but be used, as I think it was intended, to extend to such close and direct relations that the act complained of directly affects a person whom the person alleged to be bound to take care would know would be directly affected by his careless act."[29]

This statement was made in the context of a manufacturer putting a contaminated product into circulation, likely to cause injury to a consumer since there was no possibility of intermediate examination. There was no physical proximity between the manufacturer and the consumer in *Donoghue v Stevenson* yet, Lord Atkin was stating that proximity had not merely a physical dimension but included "*such close*

[28] Ibid at 580,581.
[29] Ibid at 581.

and direct relations that the act complained of *directly affects a person* whom the person alleged to be bound to take care would know would be directly affected by his careless act."[30](emphasis added). Lord Atkin here was stating that "neighbourhood" or "proximity" included causal and circumstantial closeness and directness of relations and was not confined to mere physical nearness.

It is this basic test of "neighbourhood" or "proximity" (the historic and narrow meaning of proximity) which has been enlisted in recent judgments in the High Court of Australia as the foundation for determining whether a *prima facie* duty exists.

The High Court's Return to First Principle

Three recent cases heard before a Full Bench of the High Court of Australia suggest the Court is returning to a fundamental application of Lord Atkin's "neighbourhood" principle to answer the duty question.

In *Annetts v Australian Stations Pty Limited*[31]; *Graham Barclay Oysters Pty Ltd v Ryan*; *Ryan v Great Lakes Council;New South Wales v Ryan*[32]and *Gifford v Strang Patrick Stevedoring Pty Ltd*[33] there has been consistent use by all Justices of Lord Atkin's formulation.

The Facts of *Annetts*

The facts as summarized by Gleeson CJ[34] were that Mr and Mrs Annetts son, aged 16, had gone to work for the respondent as a jackeroo in August 1986. Seven weeks later,

[30] Ibid
[31] (2002) 76 ALJR 1348
[32] (2002) 77 ALJR 183
[33] (2003) 77 ALJR 1205
[34] (2002) 76 ALJR 1348 at 1355

allegedly, contrary to the assurances that had earlier been given to the parents, he was sent to work alone as a caretaker on a remote property. In December 1986, he went missing in circumstances where it was clear that he was in grave danger. When Mr Annetts was informed of this by the police, over the telephone, he collapsed. There was a prolonged search for the boy, in which Mr and Mrs Annetts took some part. His bloodstained hat was found in January 1987. In April 1987 the body of the boy was found in the desert. He had died of dehydration, exhaustion and hypothermia. Mr and Mrs Annetts were informed by telephone. Subsequently Mr Annetts was shown a photograph of the skeleton which he identified as that of his son. Mr and Mrs Annetts who themselves had responsibilities for the care of their son, only agreed to permit him to go to work for the employer after having made enquiries of the employer as to the arrangements that would be made for his safety and, in particular, after being assured that he would be under constant supervision. Contrary to those assurances, he was sent to work, alone, in a remote location. The aetiology of the psychiatric illness suffered by Mr and Mrs Annetts (plaintiffs) was unclear.

The Duty of Care Issue in *Annetts*

The Chief Justice in *Annetts* reaffirmed the place of Lord Atkin's over-arching principle:

> "Lord Atkin in *Donoghue v Stevenson*, spoke of the effect of acts or omissions on 'persons who are so closely and directly affected by my act that I ought reasonably to have them in contemplation as being so affected when I am directing my mind to the acts or omissions which are called in question'. It is the reasonableness of a requirement that a defendant should have certain persons and certain interests, in contemplation, that determines the existence of a duty of care"[35]

[35] Ibid at 1351

The Chief Justice then specifically applied Lord Atkin's formulation to the facts at hand:

> "The applicants, on the assumed facts, who themselves had responsibilities for the care of their son, only agreed to permit him to go to work for the respondent after having made inquiries of the respondent as to the arrangements that would be made for his safety and, in particular, after being assured that he would be under constant supervision. Contrary to those assurances, he was sent to work, alone, in a remote location. In those circumstances there was a relationship between the applicants and the respondent of such a nature that it was reasonable to require the respondent to have in contemplation the kind of injury to the applicants that they suffered."[36]

Gaudron J likewise applied the "neighbour" principle :

> "…..a person will be able to recover for psychiatric injury only if there is some special feature of the relationship between that person and the person whose acts or omissions are in question such that it can be said that the latter should have the former in contemplation as a person closely and directly affected by his or her acts"[37]

She then applied the "neighbour" question to the facts:

> "On the assumed facts of the second case it is possible to identify special features of the relationship between Mr and Mrs Annetts and Australian Stations such that the latter should have had them in contemplation as persons closely and directly affected by its acts and omissions in relation to their son."[38]

McHugh J after an analysis of Lord Atkin's judgment in *Donohue v Stevenson* concluded that:

> "Neighbour = person closely and directly affected = proximity… It is true that reasonable foreseeability is not at large. You come under a duty only in

[36] Ibid at 1356
[37] Ibid at 1357,1358
[38] Ibid at 1358

> respect of acts and omissions that you can reasonably foresee may affect your neighbours – persons who are directly and closely affected by your acts."[39]

McHugh J considered that a duty of care arose in the special pre-existing relationship between the employer (defendant)and the plaintiffs (Mr and Mrs Annetts):

> "In the present case, the assurance of the employer gave rise to a duty on its part to supervise and take care of James so as to avoid inflicting harm on Mr and Mrs Annetts. The consideration for their consent to his going to Flora Valley and working for the employer was the assurance that the employer would supervise and take good care of him. They could have sued in contract, but they elected to sue in negligence under the general law. The result is the same. The assurance of the employer gave rise to a duty, the breach of which entitled Mr and Mrs Annetts to sue for any damage suffered that was reasonably foreseeable in a general way."[40]

Callinan J specifically relied on the relationship of proximity (meaning the close and direct relationship established between the employer of the deceased boy and parents of the deceased boy) as the foundation for a duty of care in *Annetts*:

> "At the outset it is important to point out that it was the applicants' case that the breach of duty relied on was a breach of the duty of care owed to the applicants by the respondent as an employer of the applicants' child. The way in which the applicants alleged a relationship of proximity is important.
>
> > 'The Plaintiffs and the Defendant were at all material times in a relationship of proximity arising from the following facts and matters:
> >
> > (a) the Defendant knew the Plaintiffs were the parents of the Deceased;
> >
> > (b) the Plaintiffs had made inquiries of the servants or agents of the Defendant in relation to the arrangements for the safety of the Deceased and received assurances in relation to his safety;
> >
> > (c) the Defendant knew that if there was a breach of the duty of care owed to the Deceased, that he may die in circumstances of

[39] Ibid at 1366,1367
[40] Ibid at 1373

particular distress to his parents having regard to his manner of death namely perishing in the desert;

(d) the Defendant knew of the ongoing concern of the Plaintiffs in relation to the supervision of the Deceased and were on notice by reason of their earlier and ongoing inquiries that if there was a breach of the duty of care owed by the Defendant as the employer of the Deceased to the Deceased that there was a foreseeable risk that the parents would suffer not only a grief reaction but in addition a reaction extending beyond grief to an entrenched psychiatric condition of the type which has since developed;

(e) the Plaintiffs also allege that as parents of the Deceased they were within the range of persons who an employer owed a duty of care to and that breach of the employer's duty of care resulting in death to a young employee such as the Deceased, would be likely to cause psychiatric injury to near relatives;

(f) the Plaintiffs relied upon the Defendant to supervise the Deceased as a 16 year old child and entrusted [it] with his care and welfare, a matter about which the Defendant knew or ought to have known."

I endorse the applicants' submission that by reason of the relationship of proximity identified in the paragraphs above, the respondent owed a duty of care to the applicants as the parents of the deceased."[41]

The close and direct relationship between the employer and the

parents of the deceased boy underpinned the finding of duty in the joint

judgment of Gummow and Kirby JJ:

" The connections between the parties indicate the existence of a duty of care. An antecedent relationship between the plaintiff and the defendant, especially where the latter has assumed some responsibility to the former to avoid exposing him or her to a risk of psychiatric harm, may supply the basis for importing a duty of care…. In the present case, the applicants sought and obtained from the respondent assurances that James would be appropriately supervised. The respondent undertook specifically to act to minimise the risk of harm to James and, by inference, to minimise the risk of psychiatric injury to the applicants. In those circumstances, the recognition of a duty of care does not raise the prospect of an intolerably large or indeterminate class of potential plaintiffs."[42]

[41] Ibid at 1413
[42] Ibid at 1390, 1391

Similarly, Hayne J focused on the closeness of relationship between the parents of the deceased boy and the defendant as the basis for duty of care:

> "The relationship which existed, between the parents of a child and the defendant for whom and at whose premises the child was to work and to live, may readily be seen to be a relationship in which the defendant may owe the parent a duty to take reasonable care not to cause psychiatric harm to parents of reasonable or ordinary fortitude by reason of the negligent causing of injury or death to the child."[43]

The Facts of *Barclay Oysters*

The essential facts underlying the litigation are summarized concisely by Gleeson CJ:

"In December 1996, Mr Ryan consumed oysters that a relative had purchased from the companies described in the joint judgment as the Barclay companies. The oysters which had been grown in Wallis Lake, near Forster (New South Wales) were contaminated. In consequence, Mr Ryan contracted the Hepatitis A virus ("HAV"). Heavy rainfall over a period in November 1996 had increased the risk of pollution of the Lake from a number of sources, and had resulted in cessation of harvesting for four days. In February 1997, a HAV epidemic was notified, and on 14 February 1997 Wallis Lake growers ceased harvesting for the season. In seeking to assign legal responsibility for the harm he suffered, Mr Ryan blamed the growers and distributors of the oysters (the Barclay Companies), the Great Lakes Council, which was the local government authority that exercised regulatory functions, including functions designed to protect the environment, under the Local Government Act 1993 (NSW), and the State of NSW."[44]

[43] Ibid at 1403
[44] (2002) 77 ALJR 183 at 186

The issues in the appeal before the High Court were whether the State of NSW or the Great Lakes Council owed a duty of care to Mr Ryan and whether the Barclay companies breached the duty of care that they admittedly owed to Mr Ryan.[45]

The Duty of Care Issue in *Barclay Oysters*

Kirby J in reference to the resolution of the duty of care question in Australia commented that "it would be desirable for the court to identify a universal methodology or approach, to guide the countless judges, legal practitioners, litigants, insurance companies and ordinary citizens in resolving contested issues about the existence or absence of a duty of care, the breach of which will give rise to a cause of action enforceable under the common law tort of negligence."[46] Kirby J suggested that Courts such as this should recall the prayer of Ajax: "Save us from this fog and give us a clear sky, so that we can use our eyes"[47] Kirby J suggested and applied the following methodology in the case at hand. He stated "that liability should therefore be imposed where it was judged that a reasonable person in the defendant's position could have avoided damage by exercising reasonable care and was in such a relationship that he or she ought to have acted to do so. Kirby J concluded that "despite its overt circularity, this formulation might at least offer a return to the substance of Lord Atkin's speech in *Donoghue v Stevenson*. It might afford a broad formulae that poses a factual (or jury) question and avoids the chaos into which other attempted formulae have lately led the law."[48] Kirby J then referred to the judgment of Priestley JA in *Avenhouse v Hornsby Shire Council*:

[45] Ibid at 197
[46] Ibid at 223
[47] Ibid
[48] Ibid at 229

> "Courts … decide in case after case, whether or not a duty of care exists in new situations. Consideration of all the cases of authority to date leads me to the view that the position in Australia … has returned to (or recognized the continuing applicability of) what it was immediately after the decision in *Donoghue v Stevenson*: that is, that the courts make decisions by first asking the question 'is the relationship between plaintiff and defendant in the instant case so close that a duty arose?' and then answering 'yes' or 'no' in light of the court's own experience-based judgment."[49]

Kirby J concluded that the "difficulty with this formulation is that the reference to the relationship of the parties as one 'so close that a duty arose' could quite easily slip back in to the discredited notion that 'proximity', alone, is a sufficient criterion for the assignment of a legal duty. However, so long as the 'closeness' of the relationship contemplated is not confined to physical closeness, he could see no great difficulty now (and some advantage) in leaving the features of the relationship of 'neighbourhood' undefined and simply asking whether, in all the circumstances, it is such as to make it 'reasonable to impose upon the one a duty of care to the other'. This is always the ultimate question that must be answered in all cases of a disputed duty of care in negligence."[50]

McHugh J in addressing the issue of liability of public authorities and in what circumstances they would owe a duty of care stated:

> "This Court no longer sees proximity as the criterion of a duty of care. But no duty of care can arise unless the relationship of the parties is one of neighbourhood in Lord Atkin's sense as stated in *Donoghue v Stevenson*. To create a duty the relationship between the public authority and persons affected by the conduct of the authority must be 'so closely and directly affected by its act or omission that it ought reasonably to have them in contemplation as being so affected' when it directs its mind to the relevant conduct in question. In considering whether it should exercise its powers over

[49] (1998) 44 NSWLR 1 at 8.
[50] (2002) 77 ALJR 183 at 230

> pollution the Council was no more concerned with oyster consumers than any other section of the public or individual. There was no close and direct relationship between oyster consumers and the Council such that it had a duty to take care for the safety of each and every one of them. In that respect, the Council stood in a different position from that of the Barclay Companies who had a direct relationship with the consumers of their product. Here, there was nothing to suggest that the relationship between the Council and the consumers of Wallis Lake oysters imposed on the Council an affirmative duty to take reasonable care to protect those consumers from harm caused by eating those oysters."[51]

Likewise, the joint judgment of Gummow and Hayne JJ utilized Lord Atkin's 'neighbour' principle on the duty of care issue with respect to the local authority. They concluded:

> "the conduct of the Council did not 'so closely and directly affect' oyster consumers so as to warrant the imposition of a duty of care owed by the former to the latter. There were too many levels of decision-making between the conduct of the Council and the harm suffered by the consumers."[52]

The facts of *Gifford*

The case involved claims for damages for negligently inflicted psychiatric injury brought by the children of a man who was killed in an accident at work. The issue before the court was whether the man's employer owed a duty of care to the children. The defendant, a stevedoring company, employed the late Mr Barry Gifford, who was crushed to death by a forklift vehicle. Negligence on the part of the driver of the vehicle, who was also an employee of the defendant, and on the part of the defendant itself, was alleged, and was admitted. At the time, the plaintiff children were aged 19, 17 and 14 respectively. They did not witness the accident. They were all informed of

[51] Ibid at 203,204
[52] Ibid at 220

what had occurred later on the same day. The plaintiffs claim to have suffered psychiatric injury in consequence of learning of what had happened to their father.[53]

The Duty of Care Issue in *Gifford*

Consistently with *Annetts* and *Barclay Oysters* there is express use by all Justices in *Gifford* of Lord Atkin's "neighbourhood" principle as the foundation for duty.

McHugh J posited the question on duty as follows:

> "The question then is, whether the relevant principles of the law of negligence required a finding that the respondent owed the children a duty of care to prevent psychiatric injury. That depends on whether the children were 'neighbours' in Lord Atkin's sense of that term. Were they so closely and directly affected by Strang's relationship with their father that Strang ought reasonably to have had them in contemplation when it directed its mind to the risk of injury to which it was exposing their father?"[54]

McHugh J continued:

> "A person is a neighbour in Lord Atkin's sense if he or she is one of those persons who "are so closely and directly affected by my act that I ought *reasonably* to have them in contemplation as being so affected. If the defendant ought reasonably foresee that its conduct may affect persons who have a relationship with the primary victim, a duty will arise in respect of those persons. The test is, would a reasonable person in the defendant's position, who knew or ought to know of that particular relationship, consider that the third party was so closely and directly affected by the conduct that it was reasonable to have that person in contemplation as being affected by that conduct?"[55]

McHugh J concluded that in the present case the relationship between the children and their father made them a neighbour of Strang for duty purposes.[56]

Gummow and Kirby JJ in a joint judgment in *Gifford* stated:

> "The respective positions of the child of an employee and his or her employer may readily be seen to attract the 'neighbourhood' principle encapsulated by

[53] (2003) 77 ALJR 1205 at 1207
[54] Ibid at 1215
[55] Ibid at 1216
[56] Ibid

> Lord Atkin in *Donoghue v Stevenson*. From the point of view of the employer, children of an employee are "persons who are so closely and directly affected by my act that I ought reasonably to have them in contemplation as being so affected when I am directing my mind to the acts or omissions which are called in question."[57]

Callinan J in reference to the earlier case of [*Annetts*] stated in *Gifford*:

> "In [*Annetts*] I attempted to state some bright line rules distilled from the cases and elsewhere for the prosecution of what, for convenience and other reasons, I there called, and I would continue to call claims for damages for nervous shock ….. In doing so I sought to identify and define the classes of persons in cases of nervous shock capable of being so closely and directly affected by a tortfeasor's negligence that the tortfeasor ought reasonably to have had them in contemplation in acting or omitting to act in the way in which he or she did, within the classic formulation of Lord Atkin in *Donoghue v Stevenson*."[58]

The Chief Justice considered that the central issue was whether it was reasonable to require the respondent to have in contemplation the risk of psychiatric injury to the appellants, and to take reasonable care to guard against such injury.[59]

Hayne J concluded that the employer owed a duty of care to those family members because not only was it foreseeable that they may suffer psychiatric injury on learning of the employee's accidental death or serious injury at work, but the relationships between employer and employee and between employee and children were so close as to require the conclusion that the duty was owed.[60]

Universality of the "Neighbour" Principle

One reason that might be advanced for a return to Lord Atkin's 'neighbour' principle is that "the lawyer's mind is ultimately driven to search for a unifying concept."[61]

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[57] Ibid at 1222
[58] Ibid at 1227
[59] Ibid at 1208
[60] Ibid at 1224
[61] See the foreword by Kirby J in Katter *Duty of Care in Australia* (The Law Book Co Ltd, Sydney, 1999).

The search is for some over-arching principle that underpins the duty issue in all the cases. Lord Atkin in *Donoghue v Stevenson* attempted to crystallize the "element common to the cases"[62] wherein a duty was found to exist. He considered that "there must be some general conception of relations giving rise to a duty of care which the cases found in the books are but instances".[63] As Kirby J has noted, conceptualists… seek to draw out of existing categories the unifying threads which will permit a consistent methodology or approach."[64]

It is suggested that for some seventy years the general concept of 'neighbour' as a measure of the closeness and directness of relationship between tortfeasor and victim, not confined to physical closeness but encompassing causal and circumstantial closeness (as intended by Lord Atkin) has underpinned a finding of duty of care in all categories of negligence. Labels such as voluntary assumption of responsibility, specific or general reliance, relationship next to contract, control and dependence, special relationship between the parties, are merely factors indicating closeness and directness of relationship. Such factors assist in answering the ultimate question of whether the plaintiff was *so closely and directly affected* or was in such a *close and direct relationship* with the defendant that the defendant ought to have had the plaintiff in contemplation as being so affected. This ultimate "proximity" question requires a subjective value judgment, similar to the 'reasonable foreseeability' requirement. What to one judge may involve such a close and direct relationship that the defendant ought to have had the plaintiff in contemplation, may not seem so to another judge. The weighing of relevant indicia by judges and their ultimate

[62] [1932] AC 562 at 580.
[63] Ibid.
[64] See the foreword by Kirby J in Katter *Duty of Care in Australia* (The Law Book Co Ltd, Sydney, 1999).

conclusions on the question of neighbourhood may differ. However, this is not to deny the usefulness of such an over-arching question based on an assessment of the degree of closeness and directness of relationship. The answer to such a question provided the court in 1932 with a *prima facie* guide to the novel issue of the tortious responsibility of a manufacturer to a consumer. It likewise some seventy years later is providing guidance in diverse cases such as *Annetts, Gifford* and *Barclay Oysters* with respect to negligently inflicted psychiatric illness and the liability of public authorities.

Conclusion

While it may be too soon to conclude that the High Court of Australia has made a permanent return to the seventy year old formulation of Lord Atkin in determining the duty of care, the suggestion advanced in this article is that fundamentally the 'neighbour' principle has never been abandoned by the Court, but has underpinned labels such as voluntary assumption of responsibility, specific and general reliance, relationship next to contract, control and dependence, etc. As Kirby J concluded in *Barclay Oysters*, "perhaps this is the ultimate lesson for legal theory in the attempted conceptualization of the law of negligence and the expression of a universal formula for the existence, or absence, of a legal duty of care on the part of one person to another. It may send those who pursue it around in never - ending circles that ultimately bring the traveller back to the very point at which the journey began."[65]

[65] (2002) 77 ALJR 183 at 230